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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. [redacted] ORIGINAL.

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK and THE CITY OF NEW YORK,

Defendants;

COMMONWEALTH OF PENNSYLVANIA,

Intervenor.

BRIEF OF THE DEFENDANT, THE CITY OF NEW YORK, IN REPLY TO THE BRIEF FOR THE INTERVENOR, AND IN REJOINDER TO PLAINTIFF'S REPLY BRIEF.

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Defendants,

COMMONWEALTH OF PENNSYLVANIA,
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BRIEF OF THE DEFENDANT, THE CITY OF NEW YORK, IN REPLY TO THE BRIEF FOR THE INTERVENOR, AND IN REJOINDER TO PLAINTIFF'S REPLY BRIEF.

Statement.

The admirable "BRIEF FOR COMMONWEALTH OF PENNSYLVANIA, INTERVENOR", so truly states the facts in this case, according to the actual evidence, and so frankly discusses the principal propositions of law, which are involved in its determination, that it is regretted that some of the proposals, which it urges, cannot be accepted.

POINT XII.

The application of the Intervenor Commonwealth for leave to submit further proofs, after it has completed a two-year survey of chlorides in the lower Delaware River, should be denied.

For the purpose of satisfying the City of Chester and a group of manufacturers, whose plants are there located, the Intervenor at pages 112-117 of its brief asks, substantially, that it be given leave to submit further proofs, after it has completed a two-year survey looking toward the ascertainment of the "effect upon the lower Delaware River for water supply purposes" (Brief for Pennsylvania, p. 114) of the proposed taking of water by New York. The main, if not the only, object of the Intervenor's said application is to allay and dispel the fears, lately agitating certain manufacturers in Pennsylvania, and the City of Chester (*id.*) which do

> "not warrant a change in the Pennsylvania proofs * * *" (Brief for Pennsylvania, p. 113).

The application of the Intervenor is confessedly (*id.* at p. 115) not predicated upon any desire to change its original conclusion (*id.*) that under normal conditions

> "no ocean water reaches Chester, Pennsylvania, and that all water passing Chester is land and not sea water" (*id.* at p. 109),

but is made because,

> "Late in the Fall of 1930 and AT THE END OF A SEVERE DROUGHT OF MANY MONTHS, there was an unprecedented penetration of brackish water upstream with the result that the saline content of Delaware

> River water in the vicinity of Chester exceeded by many times the maximum chlorine observed during the past six years, * * *." (Brief for Pennsylvania, p. 112).

The defendant City having had nothing which might be called notice (see Equity Rule VI) of the Intervenor's application, founded as it is upon allegations which have been known to the Intervenor since December of 1930 (Brief for Pennsylvania, p. 113), can only meet them with the Intervenor's own words:

> "the controlling factor in maintaining salinity conditions in the bay is *the tide* and not the Delaware River" (Brief for Pennsylvania, p. 130).

In a time of unprecedented drought, which has, as a matter of commonest knowledge, most seriously affected the entire nation, the Intervenor's frank statement that,

> "the controlling factor in maintaining salinity conditions in the bay is THE TIDE and not the Delaware River" (Brief for Pennsylvania, p. 130),

is more persuasive than

> "the fears of the Pennsylvania manufacturers and the City of Chester * * *" (Brief for Pennsylvania, p. 116),

which might not have had any foundation, whatever, in fact, if the plan of the defendant City had been in operation (*id.*, p. 114).

> "The need of the City for obtaining an additional water supply is real and imperative and * * * the effort to obtain an additional supply should not be delayed" (R. S. M., p. 44, R. 4793).

Neither the Intervenor nor the Plaintiff dissents from the just quoted finding of the Special Master.

To suggest as the Intervenor, very guardedly, does (Brief for Pennsylvania, pp. 116, 177), that the defendant City make all the outlays (see Defendant City's Principal Brief, pp. 38, *et seq.*), and go forward with the work upon the development not, for the time, prevented by this Court, and gamble upon the inaction of the Intervenor, involves a recklessness with the public moneys, of which the defendant City should decline to be guilty.

The proposal of the Intervenor demonstrates, most effectively, the validity (note Plaintiff's Reply Brief, p. 70) of Point IV (p. 37) of this defendant's principal brief in support of its exceptions to the report of the Special Master and furnishes additional reason for the final termination of this cause by the decree to be entered by this Court.

POINT XIII.

The control and regulation of the Delaware River should not be undertaken by this Court.

In support of the Pennsylvania plan (Brief for Pennsylvania, p. 32), which the Special Master recommended (R. S. M., p. 191, R. 4951), for imposition upon the defendant City (R. S. M., p. 210, par. (b), R. 4971), the Intervenor argues (Brief for Pennsylvania, pp. 35-36), that:

> "The naming of two points of control under the Pennsylvania plan is * * * ascribable solely to the desire of the Pennsylvania engineers to provide the best method of river control and regulation."

The judicial power (Cons. U. S., Art. III, §1), does not properly extend to any such matter, even though the orig-

inal jurisdiction of the Court is invoked by a State (Cons. U. S., Art. III, §2, Cl. 1).

The only question (Equity Rule 37), for determination in this cause is: Does the plan of the defendant City, sought to be enjoined, involve a taking of waters from the Delaware River in excess of the defendant State's equitable portion thereof?.

The proof submitted to the Special Master on behalf of the Intervenor

> "tended to confirm the proof of the State and City of New York, to the effect that the taking of the equivalent of 600 million gallons daily by the City of New York would not be injurious to New Jersey" (R. S. M., p. 186, R. 4945, see also Brief for Pennsylvania, pp. 30-31).

It may be a presently

> "undisputed fact that the Pennsylvania plan of impounding and release was formulated as a guiding rule for all takings of Delaware River water by all three States * * *" (Brief for Pennsylvania, p. 54),

but neither the Intervenor nor the Plaintiff is attempted to be bound thereby in the findings and recommendation for decree submitted by the Special Master (R. S. M., pp. 191-192, R. 4951).

The Plaintiff State may (R. S. M., p. 191, R., p. 4951), never (but see Defendant City's reply to Plaintiff's Brief, Point XI, p. 18), take any more water, than it is now taking, from the Delaware River, for any purpose. There would, therefore, be no need for the imposition upon the defendant of the Pennsylvania "method of river control and regulation" (*supra,* p. 4), however favorably the Intervenor's

engineers may regard it. Moreover, the Plaintiff may, at some indefinite future time, devise a plan for the taking (see Brief for Pennsylvania, pp. 60-61), from the New Jersey tributaries of the river, of, say 44/60ths (see Defendant City's Reply to Plaintiff's Brief, p. 19) of 400 million gallons daily (R. S. M., p. 186, R. 4945), which might be superior (see Brief for Pennsylvania, p. 9), to that which the Intervenor now (see R. S. M., p. 192, R. 4951) advocates.

> "There is no present or definite project on the part of Pennsylvania or the City of Philadelphia to resort to the Pennsylvania tributaries of the Delaware River for an additional water supply" (R. S. M., p. 187, R. 4946),

and the Plaintiff disclaims

> "any project or plan * * * for the taking of waters from the New Jersey tributaries of the Delaware River" (R. S. M., p. 191, R. 4951).

The only object of the Pennsylvania plan in seeking to impose a stage control of the river, both at Port Jervis and at Trenton (see Point III, p. 31, *et seq.*, of Defendant City's Principal Brief), is to

> "insure a more satisfactory regimen of the river" (Brief for Pennsylvania, p. 37),

during the infrequent times (*id.*) when that very flashy stream (R. S. M., p. 62, R. 4812), falls below the stage, prescribed in the Pennsylvania plan (Brief for Pennsylvania, p. 37), of 0.5 c. s. m. (*id.*, p. 32, R. S. M., p. 208, par. (b), R. 4969), at Trenton, N. J.

There is no proof whatever that any such event would, or would be likely to, occur when the defendant City was

taking only the equivalent of 440 m. g. d., and, certainly, none, (see Brief for Pennsylvania, p. 37), that it would or could occur, BECAUSE OF THE TAKING of 600 m. g. d. by the defendant City from tributaries as far distant from Trenton as 227 miles (R. S. M., p. 53, R. 4803), even at the times when the flow of the river at Trenton might be as low as 1,240 c. f. s. (R. S. M., p. 62, R. 4812).

That the Intervenor's engineers, in the best good faith, formulated and advanced

> "the Pennsylvania plan of impounding and release * * * as a guiding rule for all takings of Delaware River water by all three States" (Brief for Pennsylvania, p. 54),

is not doubted; but, *in the absence* of any (*id.*, p. 157), definite or present project for the taking of waters from the river by the Intervenor (R. S. M., p. 187, R. 4946), and, *in the presence* of the Plaintiff's disclaimer of intention to take (R. S. M., p. 191, R. 4951), this "guiding rule" is nothing but an attempt to provide in advance (see R. S. M., pp. 191-192, R. 4951), against

> "an equally groundless New Jersey charge of substantial damage" (Brief for Pennsylvania, p. 65),

when the Intervenor, and one or more of its municipalities,

> "are ready to take in the future their fair and equitable share of water from the Pennsylvania tributaries of the upper Delaware River" (*id.*).

The defendant City, out of its experience in this case, does not consider that the fear which the Intervenor expressed at page 65 of its brief (*supra*, p. 7) is mere nervous apprehension. But, as the defendants have had to

be delayed in their great and necessary project by the appalling lack of proof of substantial damage (Brief for Pennsylvania, p. 120) to the Plaintiff, so also must the Intervenor be prepared to oppose logic to its opposite, and fact to opinion when it, or one of its municipalities, undertakes to utilize for their highest purpose (*Connecticut* v. *Massachusetts*, 75 L. Ed. 297, 304) the waters of tributaries of the Delaware River, located wholly within the Commonwealth of Pennsylvania.

River Master.

The application of the Intervenor for the appointment of a River Master

> "is based solely on the contention that such an appointment is necessary to carry out more effectively the decree of this Court in regard to the division and use of the waters of the Delaware River and its tributaries." (Brief for Pennsylvania, p. 159.)

The appointment of such a functionary can only be justified as an incident of the Pennsylvania plan, if that plan be (and it is not and cannot be) made binding upon all three States (Brief for Pennsylvania, p. 54, *supra*, p. 7).

The very least that the defendant City expects to obtain as the result of the final hearing of this cause, is a decree under which it will be permitted, immediately, to take from the wholly intra-state and non-navigable tributaries of the Delaware River (R. S. M., p. 83, R. 4836), the equivalent of 440 million gallons of water per day (R. S. M., p. 209, par. 2, R. 4970). With the control of releases at Port Jervis (see principal brief for the defendant City,

p. 31), where there is a public (Brief for Pennsylvania, p. 160) gaging station, conducted by the United States Geological Survey (R. S. M., p. 67, R. 4818), there would be nothing for a River Master to do, but ascertain, from time to time, the stage of the river and notify the authorities of the defendant City either to release water or that they might discontinue releasing water. There is no reason to doubt (see Brief for Pennsylvania, p. 159) that the officials of the defendant City would not be as faithful and zealous in the discharge of such function as any River Master might be. No River Master could be given power

> "to direct what use shall be made of the surplus waters which should not be permitted to flow wastefully and without regulation over the spillways of the impounding reservoirs" (Brief for Pennsylvania, pp. 160-161),

unless this Court cares to vest in him an authority which it, itself, would never assume to exercise. Quite aside from the obedience which the defendants would give to the decree of this Court, without any compulsion, the punitive powers of the Court would be much more effective in securing compliance with its final decree than any ephemeral fiat of a River Master possibly could.

With the defendant City taking the equivalent of 600 m. g. d. from the tributaries of the Delaware designated in its plan (Complaint, p. 12, par. 19, R. 4541), and, in accordance with that plan, at all dry times guaranteeing a total flow, below the point of storage, of 275 cubic feet per second (R. S. M., p. 55, R. 4805), which is 100 c. f. s. more than the lowest recorded flow at Port Jervis (R. S. M., p. 62, R. 4812), and at a place approximately 105 miles upstream from Port Jervis (see R. S. M., p. 53, R. 4803), no com-

plex problems are presented, and the duty of the defendant City is clear (see R. S. M., p. 211, par. (c), R. 4971-4972), not to a River Master at Trenton or Port Jervis or elsewhere, but to the officials of the defendant City, at the impounding points, personally charged with the duty of releasing water.

The defendant City, we think, yielded more than it should be called upon to concede, when it said that it

> "will not object to a finding based on the Pennsylvania plan of release if it be modified so that the control of the release is at Port Jervis and not at both Port Jervis and Trenton" (Principal Brief on Behalf of the Defendant City, p. 31).

To impose a River Master upon it, and the full Pennsylvania plan, will merely serve to increase its difficulties, without adequate reason.

Before passing from this point it is deemed desirable to notice the too sharp comment at page 55 of the Brief for Pennsylvania on the reference by this defendant, at pages 35-36 of the defendant City's principal brief, to the Wallenpaupack project, now operating in Pennsylvania, for the purpose of illustrating what demands might be made against it, if the Pennsylvania plan were imposed upon it. The testimony of the Intervenor's witness, Mr. Ryder, was as follows (R. 3592):

> "Q. Are the releases from the Wallenpaupack wave made without regard to the flow in the river below?
>
> A. Yes, sir.
>
> Q. So that is not a regulatory proposition at all?
>
> A. It is not intended for that purpose. It is purely a power development which has the effect of regulating the flow.

Q. But without regard to the need for regulation?
A. Yes, sir.
Q. It is a purely commercial enterprise.
A. Yes, sir."

The defendant City never harbored or expressed the view that the waters impounded in Pennsylvania for the Wallenpaupack project do not "intermittently" reach the Delaware River, without diminution of quantity. What it does insist upon is, that the above quoted testimony aptly illustrates the hardship which the Pennsylvania plan imposes, and has capacity for imposing, upon it, because it does not, and cannot, apply equally to the Intervenor and the Plaintiff.

POINT XIV.

The Special Master did not find that the execution of the plan of the defendant City would occasion any substantial damage to recreational facilities or to the oyster industry.

The statement at page 41 of Plaintiff's Reply Brief that the Special Master concluded

> "that there was **'substantial'** damage to recreational facilities or the oyster industry,"

presents so daring an interpretation (see R. S. M. p. 94, R. 4847) of what the Special Master actually found on the subjects of recreational facilities and the oyster industry that it cannot be passed over as an inadvertence.

The same misrepresentation as to a finding by the Special Master of "substantial damage" to these interests through the operation of the plan of the defendant City is

made at pages 3, 4, 15, 40 and 70 of Plaintiff's Reply Brief.

At pages 15-16 of the principal Brief on Behalf of the Defendant, The City of New York, it was forthrightly stated that:

> "The utmost in damage which the Special Master found was 'somewhat more than slight damage' (R. S. M., pp. 205-206, pars. 37, 38) to the oyster industry in Delaware Bay (Complaint, pp. 15-17, pars. 25, 26), and to the recreational uses of the river (R. S. M., p. 205, par. 37)."

At page 16 of Plaintiff's Reply Brief, where the topic under discussion is *Oysters*, the Plaintiff says that:

> "No exceptions were filed by the plaintiff because the finding was favorable to its contention."

It makes a similar observation at page 5 of Plaintiff's Reply Brief, where the subject-matter is *Recreation*.

The word "slight"

> "usually implies unimportance or insignificance."
>
> *Moxley* v. *Hertz*, 216 U. S. 344, 356;
> *City of Janesville* v. *Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 811.

The term "somewhat" means

> "in some degree or measure; a little."
>
> *Atchison T. & S. F. Ry. Co.* v. *Vanordstrand*, 67 Kan. 386, 73 Pac. 113, 115.

Neither "slight" (see Plaintiff's Reply Brief, p. 40) nor "somewhat more than slight" (*supra*, p. 12) is the equivalent of "great", which is defined as

"more than ordinary in degree; very considerable in degree; * * *."

Gulf, C. & S. F. Ry. Co. v. *Smith*, 87 Tex. 348, 28 S. W. 520, 522.

Nor does proof of "slight" and "somewhat more than slight" damage sustain the Plaintiff's burden, in a suit of this character,

"much greater than that generally required to be borne by one seeking an injunction in a suit between private parties."

Connecticut v. *Massachusetts*, 75 L. Ed. 297, 302.

The Plaintiff's lack of proofs as to substantial damage are, as the Intervenor describes them, "appalling" (Brief for Pennsylvania, p. 120). Their triviality (see *Bear Cat Mining Co.* v. *Grasselli Chemical Co.*, 247 Fed. 286, 288) cannot by any process of interpretation (see *supra*, p. 11) be exaggerated into substantiality (see *Moxley* v. *Hertz*, 216 U. S. 344, 356).

POINT XV.

Nothing advanced by the plaintiff in its reply brief overcomes the findings against it, made by the Special Master.

Believing that this Court would prefer the impartisan views of the Special Master rather than this defendant's, however unintentional, bias, the defendant City has not in its several briefs attempted, by particular challenge, to meet all the sophistries, fallacies and aberrations from the facts, with which the "Plaintiff's Brief on Exceptions to

the Report of the Special Master'' and the ''Plaintiff's Reply Brief'' are replete. To do so

> ''would virtually amount to a rescript of the record'' (R. S. M., p. 13; R. 4760),

which, like the Special Master, we

> ''think would not be helpful to the Court'' (R. S. M., p. 13; R. 4760-4761).

The defendant City does, however, think that it should not fail to bring, specifically, to the Court's attention the following attempts of the Plaintiff in its Reply Brief to turn the mind of the Court away from the actual facts:

At pages 13 and 14 of its Reply Brief, the Plaintiff refers to Exhibit 202, which was a list of 76 hotels, cottages and recreational features in the neighborhood of Delaware Water Gap, but omits to state that only one of these 76 enterprises was located in New Jersey.

At page 26 of its Reply Brief the Plaintiff adverts to the testimony of one of its witnesses to the effect that the amount of heat brought into Delaware Bay from April to August by 600 m. g. d. was the equivalent of that produced by 17 million tons of coal, but neglects to state that its only attempt to controvert the testimony of a competent witness for the defendant City, that the above figure of 17 million tons was 110 times too large, was at pages 425 and 446 of its Brief Before the Special Master, where it contended that the estimate, for one month only, of the City's contradicting witness was ''less than half of what it should be''.

At page 52 of its Reply Brief, the Plaintiff, in support of its conclusion, not supported by an exception (Plaintiff's Reply Brief, p. 40),

> "that the fish industry [note Brief for Pennsylvania, p. 120] will suffer substantial injury" (Plaintiff's Reply Brief, p. 53),

because of the operation of the plan of the defendant City, make the following highly excessive statements:

> "For several years the young fish were killed by pollution and the subsequent catch was affected (R. 2143)."

The testimony of the Plaintiff's witness Walter H. Fell, purporting to be epitomized in the above quotation, appears at R. 2144 and is as follows:

> "The catch of fish is dependent upon the condition of water, oftentimes, temperature of the water. It is dependent upon pollution of several years previous. If the pollution has killed the young fish going down the stream, that would have an effect on several years to come. They would not have grown up to ascend the river and spawn further. But I have no scientific knowledge as to that."

Similar perversions of the testimony as actually given by the witnesses appear throughout both of the briefs heretofore filed on behalf of the Plaintiff. Similar "interpretations" and exaggerations appeared in the brief submitted for the Plaintiff to the Special Master and increased the difficulties of his task. This Court will know how to deal with them.

Conclusion.

The Brief for Pennsylvania, except as to the matters discussed in the first points of this brief, cogently supports the right of the defendant City to take the equivalent of

600 million gallons of water per day from the non-navigable tributaries of the Delaware River involved in this controversy. So far, however, as it attempts to keep this case open for two years, while it seeks further proofs as to the penetration upstream of sea water, and to induce this Court to become an agency for the control and regulation of the Delaware River, and its tributaries, it must fail.

The Plaintiff's Reply Brief, to which this brief is a partial rejoinder illustrates the entire lack of merit of the Plaintiff's cause.

Respectfully submitted,

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